

Federal Communications Commission

DA 98-775

APR 27

DISPATCHED
Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations.
(Brewster, Massachusetts)

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MM Docket No. 98-58
RM-9252

NOTICE OF PROPOSED RULE MAKING

Adopted: April 15, 1998

Released: April 24, 1998

Comment Date: June 15, 1998

Reply Date: June 30, 1998

By the Chief, Allocations Branch

1. Before the Commission for consideration is a petition for rule making filed by Brewster Broadcasting Company ("BBC"), proposing the allotment of Channel 232A at Brewster, Massachusetts, as that community's first local broadcast service. BBC indicated that it would file an application for Channel 232A at Brewster if the channel is allotted to the community.

2. Section 307(b) of the Communications Act of 1934, as amended, requires that the Commission allot channels "...among the several states and communities." The Commission has defined "communities" as geographically identifiable population groupings. Generally, if a community is incorporated or listed in the U.S. Census, that is sufficient to satisfy its status. Absent such recognizable community factors, the petitioner must present the Commission with sufficient information to demonstrate that such a place has social, economic, or cultural indicia to qualify it as a community for allotment purposes. See e.g., Oak Grove, FL, 5 FCC Rcd 3774 (1990); Hannibal, OH, 5 FCC Rcd 3315 (1990); and Statenville, GA, 5 FCC Rcd 2685 (1990). Here, the community of Brewster is an unincorporated community in the Town of Brewster in Barnstable County. We find that the Town of Brewster can be located on a map, is listed in the U. S. Census as a Census Designated Place with a population of 1,818 people and has a post office and zip code. In support of its proposal, BBC has stated that Brewster is an historic sea captains' town located on the bay side of Cape Cod deserving of a local radio service. BBC points out that the "town" of Brewster, which contains the community of Brewster, was incorporated in 1803, has two nationally-acclaimed 18-hole golf courses, over 15 bed and breakfast inns, over 30 art galleries, craft shops and antique shops and is governed by a board of selectmen. Further, there is an elementary school, library operated by the Brewster Ladies'

Library Association, several museums and a Nursing/Retirement home. Although the above information favors Brewster's status as a community, it is not clear if BBC is providing information for the community of Brewster or the "town" of Brewster.¹ Therefore, we may find that the above information does not constitute a community for allotment purposes with respect to Brewster, where the community may be devoid of the customary factors associated with determining community status, such as a public library, shopping centers, community churches, a newspaper and social or civic organizations. See e.g., Searles Valley, CA, 3 FCC Rcd 5221 (1900); see also Naples, FL, 41 RR ed 1549 (1977). In past cases, we have rejected claims of community status where a nexus has not been shown between the political, social and commercial organizations and the community in question. Likewise, we have not allotted channels to townships. See Hawthorne, Wisconsin, 12 FCC Rcd 20142 (1997) and Bear Creek and Pocono Pines, Pennsylvania, 12 FCC Rcd 10489 (1997). Therefore, BBC is requested to present the Commission with specific information to demonstrate that the community of Brewster has the social, economic and governmental indicia to qualify it as a "community" for allotment purposes. See Gretna, Marianna, Quincy and Tallahassee, FL, 6 FCC Rcd 633 (1991) and cases cited therein. We recognize that BBC has indicated there are some businesses, civic associations and a school in Brewster, but it has not identified those entities with addresses or shown that they are intended to serve residents of Brewster as opposed to the "town" of Brewster or Barnstable County. BBC is requested to provide information showing that the organizations, civic groups, churches, schools, police, etc., have a nexus with Brewster.

3. A staff engineering analysis indicates that Channel 232A can be allotted to Brewster consistent with the minimum distance separation requirements of the Commission's Rules provided there is a site restriction 6.3 kilometers (3.9 miles) west of the community.² The site

¹ As stated in the 1998 Rand McNally Commercial Atlas, in the New England states:

counties are divided into townships or "towns." These units are very important administratively and are well known locally. In the six New England states the "towns" are much more important in local life than the counties themselves. Moreover, these "towns" and townships are legally incorporated units and possess most or all of the powers that incorporated cities exercise.

In the New England states, a "town" is typically an area of fifteen, twenty, thirty or even more square miles. Usually it contains a central village having the same name as the "town," but it may also include other villages, smaller localities, and farms. Only rarely do the villages within the "town" have separate corporate status. Such "towns" come closer to resembling townships found in the Middle West than they do the incorporated localities known as "towns" in other states. Because of this, the Bureau of the Census does not consider these "towns" to be "incorporated places. (page 97)

² The coordinates for Channel 232A at Brewster are 41-46-31 and 70-00-38.

restriction will prevent a conflict with Station WHJY, Channel 231B, Providence, Rhode Island, and Station WJMN, Channel 233B, Boston, Massachusetts.³

4. In view of the fact that the proposed allotment would provide a first local service to Brewster, the Commission believes it would serve the public interest to solicit comments on the proposal to allot Channel 232A to Brewster, in the event it is ultimately found to qualify as a community for allotment purposes. Therefore, we will seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to Brewster, as follows:

Community	Channel No.	
	Present	Proposed
Brewster, Massachusetts	-----	232A

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **June 15, 1998**, and reply comments on or before **June 30, 1998**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D. C., 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Gary S. Smithwick
Smithwick & Belendiuk, P.C.
1990 M Street, N.W., Suite 510
Washington, D. C. 20036

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding contact Kathleen Scheuerle, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making

³The license for Station WXTK, West Yarmouth, Massachusetts, was recently modified to specify operation on Channel 236B in lieu of Channel 235B (BPH-960702IE). Therefore, no short spacing occurs between Station WXTK, West Yarmouth and Channel 232A, Brewster.

proceeding, members of the public are advised that no ex parte presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the commission or review by any court. An ex parte presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an ex parte presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an ex parte presentation and shall not be considered in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204.(b) and 0.283 of the Commission's Rules, **IT IS PROPOSED TO AMEND** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the Notice of Proposed Rule Making to which this Appendix is attached.

2. Showings Required. Comments are invited on the proposal(s) discussed in the Notice of Proposed Rule Making to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. Cut-off Procedures. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules).

(b) With respect to petitions for rule making which conflict with the proposal(s) in this Notice, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. Comments and Reply Comments; Service. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the Notice of Proposed Rule Making to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties, must be made in written comments reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal communications Commission, Washington, D. C. 20554.

5. Number of Copies. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. Public Inspection of Filings. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street, N.W., Washington, D. C.